

Members

Rep. Jackie Walorski, Chairperson
Rep. Ryan Dvorak
Sen. Luke Kenley
Sen. John Broden
Art Harris
Tobias Buck
Jeff Miller
Mark Stuaan
Sue Shadley
Mayor John Zumer
Mayor Shannon Buskirk
Jim Flannery
Carol McDowell
John Land
Gordon Durnil
Stephen Johnson
Tom Easterly
Robert Carter



ENVIRONMENTAL CRIMES TASK FORCE

Legislative Services Agency
200 West Washington Street, Suite 301
Indianapolis, Indiana 46204-2789
Tel: (317) 233-0696 Fax: (317) 232-2554

LSA Staff:

Robert Bond, Attorney for the Task Force
Andrew Hedges, Attorney for the Task Force
Bernadette Bartlett, Fiscal Analyst for the Task Force

Authority: P.L. 63-2005 (SEA 195-2005)

MEETING MINUTES¹

Meeting Date: November 17, 2006
Meeting Time: 10:00 am
Meeting Place: State House, 200 W. Washington St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 7

Members Present: Sen. Luke Kenley; Rep. Ryan Dvorak; Art Harris; Jeff Miller; Mark Stuaan; Sue Shadley; Mayor John Zumer; Mayor Shannon Buskirk; Jim Flannery; Gordon Durnil; Tom Easterly.

Members Absent: Rep. Jackie Walorski, Chairperson; Sen. John Broden; Tobias Buck; Carol McDowell; John Land; Stephen Johnson; Robert Carter.

1. Call to Order

Sen. Kenley chaired the meeting on behalf of Rep. Walorski, and called the meeting to order at 10:10 a.m.

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

2. Opening Comments

Sen. Kenley began the meeting by thanking the Task Force for its work in generating the draft environmental crimes bill currently under consideration (the "new draft"). He indicated that issues raised by Task Force members since the last meeting will be discussed. He asked the Task Force members to consider recommending to the General Assembly for adoption the new draft, as amended based on today's discussion.

3. Committee Discussion and Public Testimony

Staff attorney Andy Hedges explained the following differences between the bill draft considered at the last meeting and the new draft:

- A. In the prior version, a person committed a crime by (1) violating a statute or permit; (2) discharging a contaminant; and (3) causing harm or the risk of harm. In the new draft, a person commits a crime if the person: (1) violates a statute or permit; and (2) discharges a contaminant, if the discharge results in harm. The new draft also provides that the state has the burden of proving that the violation is the proximate cause of the discharge. The net effect of these changes is that the state has to prove that the violation caused the discharge and that the harm resulted from the discharge.
- B. In the unjust enrichment section, "may" was changed to "shall," requiring (not just permitting) a court to consider any improper economic benefit received by the defendant. In addition, language was added specifying that the improper economic benefit received by the defendant must have accrued "as a result of the unlawful conduct."
- C. The term "state regulated wetland" is used throughout the new draft.
- D. In the new draft, harm caused to animals must occur specifically to vertebrate animals.

Joe Miller, Rose Acre Farms, expressed concern that the criminal fines in the new draft are substantially higher than the fines under current law for other types of criminal violations. He also suggested that in the event of both civil and criminal actions concerning the same violation, double jeopardy issues could arise if punitive civil fines are imposed and there is then an effort to impose criminal fines. Andy Hedges noted a court case in which it was found that the controlled substance excise tax was found to be punitive and criminal prosecution of a person subject to the tax was considered to be barred by double jeopardy. The Guide Corporation case was cited as an instance in which both criminal and civil actions were pursued.

Mr. Miller is also concerned that the criminal element stated in the new draft concerning rendering the environment unfit in the future is unworkable. Mark Stuaan, Thomas Easterly, and Nelson Becker agreed. Mr. Easterly noted that if the level of criminal fines is lowered and there is a higher level of civil fines, enforcement agents might be pushed toward civil enforcement.

Janet McCabe, Improving Kids' Environment, expressed concerns that: (1) the criminal element concerning harm to animals should not be limited to vertebrate animals; (2) first time offenses should sometimes be considered more serious than Class A misdemeanors; (3) prosecutors will have great difficulty proving proximate cause; and (4) crimes concerning wetlands should apply regardless of whether the violator mitigates the wetlands. Mr. Stuaan noted that prosecutors are likely to proceed with prosecutions only if they find some level of causation, regardless of the causation standard under the law.

Brian Wright, Hoosier Environmental Council, stated his concern that considering alteration of information on compliance reports and other documents a Class A misdemeanor is inappropriate considering that providing false information on a fishing license is a Class D felony. He also believes that a level of penalty higher than a Class A misdemeanor is appropriate for some types of first offense. He urged consideration of the seriousness of harm to certain types of invertebrate life that becomes part of the food chain. Contaminants in prey invertebrates sometimes concentrate to cause harm in predator vertebrates.

Justin Schneider, Indiana Farm Bureau, questioned whether certain references in the new draft to laws would be considered to incorporate references to administrative rules. He believes that the draft should address causation of harm, citing the example of addition of a small amount of contaminant to already contaminated water and thereby exceeding the threshold at which harm to animals is caused.

Elisha Modisett, Indiana Department of Agriculture, expressed concern about home rule and the authority of entities like the Lake County Environmental Crimes Task Force to enforce state and federal laws and to pursue civil actions. Jim Flannery is also concerned that such an entity could be improperly used for political reasons or other reasons unrelated to environmental protection. Andy Hedges advised the Task Force on the current home rule limitations in state statutes.

Jim Flannery questioned whether references in the bill draft to "waters" should instead be "waters of the state."

Jeff Miller spoke in favor of levels of offenses based on the seriousness of the offense.

Mr. Stuaan stated his belief that the primary outstanding issues concerning the new draft are causation and gradation of the level of crime for different violations. It was suggested that if a first time offense is a Class D felony, the charge could be pleaded down to a Class A misdemeanor. Bill Wagner pointed out that such a pleading is prohibited in environmental cases under IC 13-30-6-5.

Rep. Dvorak expressed some satisfaction with the status of the bill draft, but he expects that changes in several areas will be made if the bill proceeds through the legislative process.

4. Task Force Action

Sen. Kenley discussed ways in which the Task Force could proceed, expressing his desire to introduce a bill in the next session of the General Assembly. Sen. Kenley will have changes to the most recent bill draft prepared and circulated to the Task Force members. Each member will be asked to review the changes and to respond indicating whether he or she approves the bill as amended.

5. Adjournment

The meeting was adjourned at 11:40 a.m.